U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 28 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a computer software services business. It seeks to permanently employ the beneficiary in the United States as a developer/analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an Application for Permanent Employment Certification, ETA Form 9089, certified by the U.S. Department of Labor (DOL).[1]

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate." The regulation also provides that a "[a] United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." *Id.*

The Director denied the petition in a decision dated February 28, 2012. The Director noted that the address identified on the ETA Form 9089 (labor certification) and on the Form I-140 petition as the "primary worksite"/"where the person will work" – in Ridgeland, Mississippi – is the residence of the petitioner's president, . It also serves as the company's mailing address. The petitioner claimed a "physical location" at in Jackson, Mississippi, as well, but in fact did not occupy any office space in that building. The beneficiary, on the other hand, lives in Schaumburg, Illinois. Stating the obvious, the Director observed that it was "not feasible that the beneficiary would [be] able to commute such a distance between his residence in Illinois and the primary worksite . . . in Mississippi on a daily basis." The Director concluded that the petitioner failed to show where the beneficiary would be working, misrepresented material facts with regard to the beneficiary's place of intended employment, and committed fraud on the petition and supporting documentation.

The petitioner filed a timely appeal, along with a brief from counsel and supporting documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Counsel contends that no misrepresentation was committed by the petitioner with respect to its business location and where the beneficiary would be working. documents submitted on appeal show that in Ridgeland, MS address) is usually identified as the company's address, though in Jackson, MS (address) is occasionally used as well.[2] Counsel acknowledges that the

[1] The ETA Form 9089 was filed with the DOL on December 8, 2010, and certified by the DOL on December 21, 2010. The immigrant visa petition, Form I-140, was filed on March 16, 2011.

[2] Counsel points out that the two locations are 11 miles apart and within the same metropolitan statistical area for prevailing wage determination purposes.

address is the residence of the petitioner's president, but asserts that it is also where the petitioner does most of his work on behalf of the company. As for the address, counsel indicates that it is a commercial building that was purchased by the petitioner as an investment, with some offices currently leased to tenants and other space reserved for the petitioner's own expansion. At present, however, the petitioner does not occupy any space at the address. According to counsel, because the petitioner is a consulting business it is not necessary for the owner to be at the office building address or for employees to work on-site at a company address. Counsel confirms that the beneficiary works offsite, and points out that the ETA Form 9089 disclosed this fact in Part H, Box 14 ("Work to be performed at various client sites.").

Identifying the primary worksite as the address, counsel maintains, accorded with DOL instructions for labor certification applications when the beneficiary will be working at different client sites. Counsel cites a recent decision by the Board of Alien Labor Certification Appeals (BALCA) which indicated that for roving employees the "employer's main or headquarters office" was the proper designation for place of employment. *See Amsol, Inc. et al*, 08-INA-112-148 (BALCA Sept. 3, 2009). The quoted language comes from a memorandum issued by the DOL's Employment and Training Administration – Field Memorandum No. 48-94 (May 16, 1994) § 10 – which provided that "[a]pplications involving job opportunities which require the Alien beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Service office having jurisdiction over the area in which the employer's main or headquarters office is located."

As a threshold matter, BALCA decisions are not legally binding on the AAO. The AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the federal circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even internal memoranda of U.S. Citizenship and Immigration Services (USCIS) do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

Furthermore, the AAO views the operative language in the ETA field memorandum – "employer's main or headquarters office" – as requiring a more substantial business presence than just a private residence with no employee component. That seems to be the view of BALCA as well, judging by other decisions it has rendered. *See PR Consultants Inc.*, 07-INA-66 (BALCA Jan. 16, 2008); *eBusiness Applications Solutions, Inc.*, 05-INA-87 (BALCA Dec. 6, 2006); *Global IT Solutions USI, Inc.*, 07-INA-53 (BALCA April 22, 2009). There is no evidence that the private residence of the petitioner's president in Ridgeland, Mississippi, though it may serve as the petitioner's home office and mailing address, has any capacity to house other employees. Nor is there any evidence in the record that the petitioner anticipates employing the beneficiary at that location, or in empty space at the address, any time in the future. Indeed, the petitioner makes no such claim.

With no prospect of any work being performed at the petitioner's addresses in Mississippi, and in view of the petitioner's clear intention to employ the beneficiary exclusively at client sites, the labor certification application should have expressed that intention unambiguously. Accordingly, it was disingenuous of the petitioner to identify the address (Ridgeland, Mississippi) as the "Primary worksite (where work is to be performed)" in Part H, line 1 of the ETA Form 9089, without any qualification. Counsel points out that the petitioner did state in Part H, Box 14 that the work was to be performed at various client sites. That statement, however, appears in a section of the form entitled "Specific skills or other requirements" – which was not an obvious or logical place to provide this information for the purposes of DOL review in the labor certification process. The bottom line is that absolutely no work is to be performed at the one and only address identified as the "primary worksite" on the ETA Form 9089. Consistent with the misleading labor certification, the Form I-140 petition (Part 6, line 4) also identified the Ridgeland, MS, address as "where the person will work," without qualification.

The regulation at 8 C.F.R. § 204.5(k)(4) requires that the instant petition be accompanied by an individual labor certification from the DOL. The regulation at 20 C.F.R. § 656.30(c)(2) further provides that "[a] permanent labor certification involving a specific job offer is valid only for the particular job opportunity . . . and the area of intended employment stated on the Application for Alien Employment Certification (Form ETA 750) or the Application for Permanent Employment Certification (Form ETA 9089)." In this case, the area of intended employment certified by the DOL is Ridgeland, Mississippi. The beneficiary lives in Schaumberg, Illinois, however, and there is no evidence in the record of any intent by the petitioner to employ him in Ridgefield, Mississippi, or the metropolitan statistical area of Greater Jackson. The AAO concludes, therefore, that the labor certification is not valid for the job opportunity involved in the instant petition because none of the work will be performed in the primary worksite location identified on the ETA Form 9089 and on the Form I-140.

Without a valid labor certification, the petition cannot be approved. Accordingly, the appeal will be dismissed.

Beyond the decision of the Director, the AAO notes that the letter from Accounts Manager for in Newark, Delaware, dated January 10, 2011, submitted as evidence that the beneficiary met the labor certification requirement of two years of experience in the computer field, does not satisfy the requirements of the applicable regulation at 8 C.F.R. § 204.5(g)(1). The subject regulation provides as follows:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and *a specific description of the duties performed by the alien* or of the training received.

8 C.F.R. § 204.5(g)(1) (emphasis added). The letter from Ms. states that:

> [The beneficiary] was employed full-time [by] as a Business Analyst/ Developer from October 1, 2004 to November 15, 2007. During this time he worked with software development lifecycle methodologies, BUSINESS

OBJECTS and COGNOS report technology, BUSINESS INTELLIGENCE, ORACLE, and SQL.

While this letter identifies the beneficiary's job title and lists the computer programs and technologies he worked with at [redacted] it does not provide "a specific description of the duties performed by the [beneficiary]," as required in 8 C.F.R. § 204.5(g)(1). For this reason as well, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.